

## MEMORANDUM OF LAW

DATE: February 24, 1993

TO: Mayor Susan Golding

FROM: City Attorney

SUBJECT: Potential Conflict of Interest in Nobel Athletic Park

The memorandum of January 29, 1993, to City Attorney John W. Witt from your Chief of Staff Richard Ledford, regarding a potential conflict of interest, has been referred to me for response. Essentially, you question whether you may vote or participate in discussions on Nobel Athletic Park and other matters near your personal residence.

### BACKGROUND FACTS

I obtained the following facts from Mr. Ledford's memorandum, from Mitch Berner of your staff, from Patricia Nila, Project Manager for Nobel Athletic Area (Park and Recreation Department), and from William M. Paul, Maps and Records (Engineering Department).

The Nobel Athletic Park is located on Judicial Drive, between Renaissance Avenue and Nobel Drive in the University area. You have an ownership interest exceeding \$1,000 in a home on Renaissance AvenueF

The exact location of your residence was provided to the City Attorney for purposes of researching and analyzing the legal issues presented. The location of your personal residence is not required to be disclosed under the Political Reform Act (Government Code section 87206(f)) and will not be disclosed here.

and the surrounding common area. The residence is part of the Casa Bella development. Your residence and the Casa Bella development are in close proximity to the Nobel Athletic Park.

From comparison of the maps sent with Mr. Ledford's memorandum and maps and records provided by Mr. Paul of the Engineering Department, I have determined that your residence is located approximately 450 feet from the edge of the proposed boundaries of the Nobel Athletic Park. See attached scale drawing/map (Exhibit A). Your residence is marked in solid blue

on Exhibit A. The edge of the common area in the Casa Bella development is located approximately 360 feet from the Nobel Athletic Park boundaries. The common area is marked with blue cross hatching on Exhibit A. The corner of Nobel Athletic Park closest to your residence is marked in solid red on Exhibit A.

At the Public Facilities and Recreation ("PF&R") Committee meeting of February 10, 1993, the Committee considered City Manager's Report No. 93-36 pertaining to the Nobel Athletic Area. (Copy of Manager's Report attached as Exhibit B.) In that report the Manager recommended that he be directed to continue the design of the Nobel Athletic Area as approved by the Park and Recreation Board. The PF&R Committee voted to refer the matter to the full Council on March 1, 1993, without a recommendation from the Committee.

#### APPLICABLE LAW AND ANALYSIS

The applicable law is the Political Reform Act (the "Act"), which was adopted by the people of the State of California in 1974. The Act specifies when economic conflicts of interest prohibit a public official from participating in or making a governmental decision, as follows:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest (Government Code section 87100).

To determine whether a public official will be required to disqualify him or herself from participating in a governmental decision invites examination of five (5) factors:

- 1) Is there a governmental decision at hand which will trigger a potential conflict of economic interest?
- 2) If yes, does the public official have an identifiable economic interest that might be affected by the governmental decision at hand?
- 3) If yes, is it reasonably foreseeable that the governmental decision will have a financial effect on one or more of those economic interests?
- 4) If yes, will that financial effect be material?
- 5) Even if there will be a reasonably foreseeable material financial effect on a public official's economic interest resulting from the governmental decision, will that effect be distinguishable from

the effect on the public generally?

Each of these five (5) factors is explored more fully below. Since you ask not only about the current action before Council, but also ask for guidance on upcoming unspecified matters, I attempt to provide guidance in analyzing the effect of future Council actions on your economic interests.

I. Is there a Governmental Decision at Hand?

The first issue is whether consideration of City Manager's Report No 93-36, specifically on whether to direct the Manager to continue the design of the Nobel Athletic Area, is in the nature of a governmental decision. Under Fair Political Practices Commission ("FPPC") regulations, if a public official votes on a matter or commits his or her agency to a course of action, that decision is a governmental decision. 2 Cal. Code of Regs. 18700(b)(1) and (3). Clearly, whether to direct the Manager to continue the design of Nobel Athletic Area is a governmental decision within the meaning of the Act.

II. Is there an Economic Interest?

The Council's action on March 1 is a governmental decision. Therefore, the next issue to determine is whether you, the public official, have an economic interest (as defined by the statute) that will be potentially affected by the governmental decision. The types of economic interests covered by the Act are set forth in Government Code section 87103. There are generally three (3) types of economic interests: 1) interests in real property of \$1,000 or more; 2) investment interests of \$1,000 or more; and, ) income interests of \$250 or more in the past 12 months. For purposes of determining disqualification,F  
As indicated on page one, footnote 1, the personal residence of a public official is not required to be disclosed (Government Code section 87206(f)), but the economic interest in the personal residence is required to be considered for purposes of determining disqualification (Government Code sections 87100; 87103(b)).

you have an economic

interest in real property within the meaning of the Act, because you have an ownership interest of \$1,000 or more in your residence and in the common area of the Casa Bella development. Government Code section 87103(b).

III. Will there be a Reasonably Foreseeable Material Financial Effect on an Identified Economic Interest?

A. Reason to Know and the Duty of Inquiry.

If a public official knows or has reason to know that one

of his or her economic interests as defined above may be affected by the governmental decision, then the official should go on to examine the other factors. The law does not impose strict liability on a public official to know under all circumstances whether one of his or her economic interests will be affected by the decision, nor does the law require the official to inquire about every detail of every item on the Council docket. However, the law provides clues which should put the public official on alert to inquire further about potential conflicts.

In the area of potential conflicts arising from real property interests, it behooves the official to be familiar with certain criteria in the FPPC's rules governing "material financial effect." In particular, the public official should know whether he or she has an interest in or outright owns properties within 2,500 feet of site of a proposed Council action involving real property. Although properties outside of a 2,500 foot radius of the site of a proposed action are not necessarily precluded from creating disqualifying conflicts, there is less likelihood of required disqualification. Although the FPPC rules do not state that a public official is free to ignore potential conflicts if he or she owns property outside the 2,500 foot radius, the duty of inquiry is raised only if there are "special circumstances" involved in the decision which would trigger further inquiry.

Even absent "special circumstances," however, the FPPC rules indicate that if a public official has property within the 2,500 foot radius, the public official will have "reason to know" or suspect he or she may have a disqualifying interest. That is, property within that 2,500 foot distance should put the public official on notice to inquire further.

In the present case, you own a residence that is 450 feet from the boundary of the proposed Nobel Athletic Area. The boundaries of the common area are even closer. Therefore, you have a duty to inquire further as to whether the proposed action will have a material financial effect on your property values.

**B. Is there a "Material Financial Effect?"**

Only after it is determined that an official knows, or has reason to know, that his or her economic interest may be affected by a decision does one determine whether there will be a reasonably foreseeable material financial effect on that economic interest. That issue is discussed below.

In 1988, the FPPC adopted revised rules that clarify the meaning of the term "material financial effect." 2 Cal. Code of Regs. Sections 18702 through 18702.6. A copy of those rules is

attached for your convenience (Exhibit C). Although complex and lengthy, these rules set forth in a step-by-step process how "materiality" should be determined for each type of economic interest (income, investment or real property interest). Material financial effects on real property interests are covered in Regulations 18702.1 and 18702.3.

If a public official's real property is directly involved in the governmental decision at hand, then Regulation 18702.1 would be applicable. For example, if your property were to be acquired by the City for use as a part of the Nobel Athletic Area, then Regulation 18702.1 would apply. But, if your real property is only indirectly involved in the decision, then Regulation 18702.3 would apply.

In the present case, since your property is not the proposed site for placement of the Nobel Athletic Park, then Regulation 18702.3 will apply.

For decisions involving indirect impact on real property, the determination of materiality depends in large part on the number of feet the public official's property is from the property that is the subject of decision. If the public official's property is within 300 feet of the subject property, then the public official must show that the decision will have no financial affect on the public official's property. In other words, with properties that close to the subject property, the FPPC creates a presumption that there will be a material financial effect on the public official's property resulting from the decision (Regulation 18702.3(a)(1)).

If a public official's property is between 300 and 2,500 feet from the subject property, then the result will be material if there is a reasonably foreseeable change (increase or decrease) in the fair market value of \$10,000 or more, or change (increase or decrease) in rental value of \$1,000 or more per twelve month period (Regulation 18702.3(a)(3)).

Lastly, if the public official's property is more than 2,500 feet from the subject property then the decision will not be material unless special circumstances will make the fair market value or rental value change by the amounts stated above and there will not be a similar effect on at least 25% of all properties within 2,500 feet of the public official's property or there are not at least ten other properties within 2,500 feet of the public official's property. (Regulation 18702.3(b)(1) and (2).)

In short, the FPPC regulations shift the presumptions on materiality depending on how close the public official's property is to the subject property.

C. Factors to Determine Change in Fair Market or Rental Value.

To assist in determining whether a decision will materially affect fair market or rental value or create the special circumstances which trigger operation of Regulation 18702.3(b), the FPPC has set forth the following guidelines:

1. The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;
  2. Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;
  3. In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effect on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.
- Regulation 18702.3(d).

Please note that there is also a special regulation governing decisions to construct or improve streets, sewers, etc. This special regulation is not discussed at length here because it is not relevant to the issues presented, but it is noted only to alert you to its existence for possible future reference.

Given the close proximity of the proposed Nobel Athletic Park, there is no doubt that there will be a reasonably foreseeable financial effect on your residence in the Casa Bella development. The tough question is whether that financial effect will be material on the financial interest you have in your property. Materiality is a factual determination.

For this factual determination, I turned to James L. Spotts, Director of the City's Property Department. Although not a real property appraiser himself,

The FPPC in public meetings has stated that determining materiality of effect on real property requires the expertise of a real estate appraiser or the equivalent. Absent that, there is no sure way to reach a final answer on the question presented.

Mr. Spotts is familiar with property values in the City and the principles applied in appraising real property. Based on a review of the materials and facts provided in this memorandum, in his opinion, Council actions pertaining to the Nobel Athletic Area may have a financial effect on the Casa Bella development and other

surrounding areas. Absent extensive analysis and the assistance of a real property appraiser, he is unable to state whether that financial effect would equal a \$10,000 or more change in fair market value (or \$1,000 a year change in rental value) to your financial interest in your home or the Casa Bella development. That is, he is unable to state with certainty that the financial effect on your economic interest in your residence will be material.

In light of the uncertainty about whether the result of Council action pertaining to the Nobel Athletic Area will result in a material financial effect on your property, in an abundance of caution, I recommend that you abstain from participating in discussions and voting on matters pertaining to the Nobel Athletic Area.

#### IV. Is the Public Generally Affected the Same Way?

Assuming that a public official's economic interest will be affected by the decision and that it is reasonably foreseeable that there will be a material financial effect on that economic interest, an official may still not be disqualified from participating in the decision if it can be shown that the public generally will be affected in substantially the same way.

The relevant portion of FPPC regulation 18703 defining the phrase "public generally" is set forth below. Whether the "public generally" exception applies will generally turn on the particular facts of a given situation.

A material financial effect of a governmental decision on an official's interests, as described in Government Code section 87103, is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public. Except as provided herein, an industry, trade or profession does not constitute a significant segment of the general public ~~emphasis added~~.

Essentially, under the above regulation, you will need to determine whether your residence (or the Casa Bella common area) will be affected by the Council decision in substantially the same manner as a significant segment of the public. Given the facts available at this time, I am unable to determine whether

your property will be affected substantially the same as property held by other members of the public. Therefore, I again recommend in an abundance of caution that you refrain from participating in discussions or voting on matters pertaining to the Nobel Athletic Area.

#### CONCLUSION

The Council's decision on March 1 pertaining to the Nobel Athletic Area may result in a material financial effect on your residence and surrounding common area. Therefore, in an abundance of caution, I recommend that you refrain from participating in discussions and voting on matters pertaining to the Nobel Athletic Area.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:jrl:011(x043.2)

Attachments

cc James L. Spotts, Director

Property Department

Patricia Nila, Associate Civil

Engineer/Project Manager, Park and Recreation

Department

William M. Paul, Assistant Civil Engineer,

Engineering and Development Department

ML-93-25

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